

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION

B.P.J. by her next friend and mother, HEATHER JACKSON,

*Plaintiff,*

v.

WEST VIRGINIA STATE BOARD OF  
EDUCATION, HARRISON COUNTY BOARD  
OF EDUCATION, WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES  
COMMISSION, W. CLAYTON BURCH in his  
official capacity as State Superintendent, DORA  
STUTLER in her official capacity as Harrison  
County Superintendent, and THE STATE OF  
WEST VIRGINIA,

*Defendants,*

and

LAINY ARMISTEAD,

*Defendant-Intervenor.*

Civil Action No. 2:21-cv-00316

Hon. Joseph R. Goodwin

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**PLAINTIFF’S MOTION *IN LIMINE* TO EXCLUDE DEFENDANT STATE OF WEST  
VIRGINIA’S EXHIBIT H AND SUPPORTING MEMORANDUM OF LAW**

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Plaintiff B.P.J., by and through her next friend and mother, Heather Jackson, hereby moves the Court to exclude Defendant State of West Virginia’s (“State”) Exhibit H (Dkt. No. 285-8) as inadmissible pursuant to Federal Rule of Evidence 401, 402, 403, 702, and 1006.

**ARGUMENT**

The State’s Exhibit H (Dkt. No. 285-8) should be excluded at trial. Exhibit H contains a series of four apparently homemade charts (Exs. H-1–H-4). The State asserts that Exhibit H is admissible under Rule 1006 (Dkt. No. 337 (State Reply) at 15), and seeks to rely on the Exhibit to

support assertions regarding alleged differences in athletic performance between boys and girls. (See Dkt. No. 287 (State MSJ) at 14–17.) But this Exhibit is inadmissible under Federal Rules of Evidence 401, 402, 403, 702, and 1006 and should be excluded.

To comply with Rule 1006, “a chart summarizing evidence must be an *accurate* compilation of the voluminous records sought to be summarized.” *United States v. Janati*, 374 F.3d 263, 272 (4th Cir. 2004). The chart may not be “a skewed selection of *some* of the documents to further the proponent’s theory of the case.” *United States v. Oloyede*, 933 F.3d 302, 310–11 (4th Cir. 2019). In addition, the material being summarized must be otherwise admissible. See *Janati*, 374 F.3d at 272 (“the records summarized must otherwise be admissible in evidence”). Among other things, evidence must be relevant in order to be admissible. Fed. R. Evid. 402. For evidence to be relevant, it must have a tendency to make the existence of any “‘fact [that] is of consequence in determining the action’ ‘more or less probable than it would be without the evidence.’” Fed. R. Evid. 401. And even when evidence is relevant, if its probative value is substantially outweighed by the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence,” that evidence should be excluded. Fed. R. Evid. 403.

The only possible basis for admitting Exhibit H as a demonstrative would be if it accurately summarized the testimony of Defendants’ proposed expert Dr. Gregory Brown and if Dr. Brown’s testimony was otherwise admissible. This path fails for multiple reasons.

To start, the charts were never presented as part of Dr. Brown’s expert testimony, attached to an expert report, or produced anywhere else in the record. (Dkt. No. 285-8 (State Exhibit H).) Though the State claims that Exhibit H is admissible because “Dr. Brown cites those studies in his expert report,” (Dkt. No. 337 (State Reply) at 15), the Exhibit in fact refers to certain findings from

David J. Handelsman and Espen Tonnessen that Dr. Brown conspicuously failed to include in his expert testimony. (See Dkt. No. 285-8 (State Exhibit H) at H-1; see Dkt. No. 316 (Brown *Daubert* Mot.) at 15–16.) The Exhibit is thus not an accurate “summary” of Dr. Brown’s testimony and is inadmissible under Rule 1006. See *Janati*, 374 F.3d at 272.

Moreover, even if Exhibit H were to represent a summary of Dr. Brown’s testimony (which it does not), that testimony is subject to a pending *Daubert* motion. As discussed in that motion, Dr. Brown’s testimony regarding transgender girls who receive puberty-delaying medication is unreliable under Rule 702 because, *inter alia*, the testimony draws speculative inferences about transgender girls based on comparisons of cisgender prepubertal boys and cisgender prepubertal girls, based on physical fitness studies of the population at large, and based on raw data from a single year’s worth of competition. (See Dkt. No. 316 (Brown *Daubert* Mot.) at 8–17.) For all the same reasons that Dr. Brown’s testimony about those studies is unreliable under Rule 702, a demonstrative about those studies is also inadmissible. *Janati*, 374 F.3d at 272 (noting that the records summarized by a demonstrative must be otherwise admissible).

Even were Exhibit H to summarize otherwise admissible evidence (which it does not), the State’s homemade charts should nonetheless be excluded because they are misleading under Rule 403 and inaccurately reflect the purported underlying materials under Rule 1006. See *Janati*, 374 F.3d at 272. Chart H-1, for example, appears to be a conglomeration of seven different studies compared under two different units of measurement. (See Dkt. No. 285-8 (State Exhibit H) at H-1 (alternating between using “Seconds” and “Stages” as a form of measurement).) The Chart thus inaccurately suggests that a set of data are comparable when, in fact, they are not. In addition, two of the charts in Exhibit H are vaguely characterized as indicating “male advantage over female.” (See Dkt. No. 285-8 (State Exhibit H) at H-1, H-4.) But that labeling improperly extrapolates from

what appears to be actually portrayed in the charts—race results. The State’s unsubstantiated suggestion that a discrete set of race results implies a generalized, overall athletic “advantage”—in addition to being inaccurate—would be misleading to any potential advisory jury and unduly prejudicial to B.P.J. under Rule 403.

Finally, Exhibit H should also be excluded because it is irrelevant. The charts either purport to compare cisgender boys and cisgender girls, or involve only adult transgender women. B.P.J. is not cisgender and is not an adult. (*See, e.g.*, Dkt. No. 285-8 (State Exhibit H) at H-1 (“11 Years Old Male Advantage Over Female”); H-2 (“2021 West Virginia 6th Grade Average Time Top 10 Finishers Percent Differece [sic] Between Boys and Girls”); H-4 (“Tambalis 2015 Greek Study - Male Advantage Over Female (Sample Size Over 424,000)”)).) Because none of the charts reflect content applicable to B.P.J., a twelve-year-old transgender girl on puberty blockers, they should be excluded as irrelevant.

### **CONCLUSION**

Plaintiff respectfully requests that the Court preclude Defendants from offering Defendant State of West Virginia’s Exhibit H (Dkt. No. 285-8) at trial.

Dated: June 22, 2022

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Respectfully Submitted,  
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**CERTIFICATE OF SERVICE**

I, Loree Stark, do hereby certify that on this 22nd day of June 2022, I electronically filed a true and exact copy of the *Plaintiff's Motion In Limine to Exclude Defendant State of West Virginia's Exhibit H and Supporting Memorandum of Law* with the Clerk of Court and all parties using the CM/ECF System.

/s/ Loree Stark

Loree Stark

West Virginia Bar No. 12936